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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JACQUES M. SCHIFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on September 9, 1965, affirming the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, finding Petitioner guilty of direct contempt of court (18 U.S.C. 401, 62 Stat.

701), and sentencing him into the custody of the Attorney General for a period of sixty days, and imposing a fine of $1,000.00.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, affirming the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, was rendered on September 9, 1965, and is reported at 351 F.2d 91. It is reprinted as Appendix A hereto, p. App. 1, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1965, and a timely petition for rehearing was denied on October 8, 1965. On October 22, 1965, the time for the filing of this petition was extended to December 7, 1965, by order of Mr. Justice Stewart, Circuit Justice for the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1); 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the Court could, consistent with due process, impose summary punishment for direct contempt under Rule 42(a), Federal Rules of Criminal Procedure, well after the need for immediate control of the proceedings had ended, for acts unnoted at the time they occurred?

2. Whether the sentence of sixty days imprisonment in summary proceedings for contempt denied petitioner due process of law and the right to trial by jury?

3. Whether the district court had jurisdiction under Rule 35, Federal Rules of Criminal Procedure, to correct the illegal sentence after the perfection of petitioner's appeal from that sentence?

4. Whether the elements of an offense under 47 U.S.C., §605, were shown to have been committed in the presence of the Court, so as to warrant summary proceedings for direct contempt therefor under 18 U.S.C., §401(1), and Federal Rules of Criminal Procedure, Rule 42(a)?

5. Whether the various statements made by petitioner in open court actually obstructed the performance of judicial duty, so as to be summarily punishable as direct contempt under 18 U.S.C., §401(1), and Federal Rules of Criminal Procedure, Rule 42(a)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the number and length of the constitutional provisions and statutes involved, they are set forth as Appendix B to the Petition, page App. 24, *infra.*

STATEMENT OF THE CASE

Petitioner is a licensed attorney. He appeared in that capacity to defend one Thomas Ewing Parks, who had been indicted by a federal grand jury for obstruction of justice in violation of 18 U.S.C., §1503. Also charged in the same indictment were James R. Hoffa, President of the International Brotherhood of Teamsters, and four other defendants. That indictment was an outgrowth of a trial in the Nashville Division of the District Court, in which Hoffa had been charged with certain substantive offenses. The jury had failed to agree in that case.

The trial of all defendants began in the District Court on January 20, 1964, concluding on March 6, 1964. It was a hard fought " . . . bitterly contested trial charged with emotions . . . " (App. 5). At the conclusion of the trial, Parks was found guilty of the substantive offense, and judgment was entered on the verdict. That conviction, as well as the convictions of certain other defendants, are the subject of separate petitions for certiorari to be filed in this Court, and the issues in those cases are material here only insofar as they are important features of the setting in which Petitioner's acts occurred.

One week after the conclusion of the trial, and immediately after imposition of sentence upon the defendants, the district Judge read into the record a contempt certificate (R. 3863a-3874a) by which Petitioner was adjudged guilty of seventeen previously unnoted acts of contempt. Immediately upon conclusion of the reading of the certificate, Petitioner requested that he be granted opportunity to answer the charges and that they be heard by another judge; both these requests were denied (R. 3874a-3875a).

Thereupon, Petitioner was sentenced to serve sixty days in the custody of the Attorney General and was fined $1,000.00 (R. 3876a).

On March 18, 1964, within ten days from the filing of the contempt certificate and the entry of judgment thereon, Petitioner filed Notice of Appeal to the Court of Appeals for the Sixth Circuit (R. 3585a). The record on appeal was there docketed on April 15, 1964. That court heard the cause in the regular course, and at no time has it been remanded to the District Court. The issuance of the mandate of the Court of Appeals has been stayed by Order of that Court.

On April 23, 1964, 36 days after the Court of Appeals had acquired jurisdiction of the cause, the District Court entered an Order, on its own motion, purporting to correct the sentence by striking the fine (R. 3590a). This Order recited that, in the opinion of the District Court, the imposition of both fine *and* imprisonment for direct contempt was illegal, and that the Order was entered under authority of Rule 35, Federal Rules of Criminal Procedure.

All but one of the contempts charged in the certificate consisted of statements made by Petitioner during the trial of Parks. The general burden of all the statements was that Parks was being deprived of a fair trial by reason of various acts of the prosecutors and rulings of the Court. In one category of statements Petitioner compared the Government's manner of conducting its case and various other occurrences at trial with procedures and systems of governments known for their unfairness, *e.g.*, the proceedings of the Star Chamber. A second category involved the allegation that the prosecutors had knowingly offered perjured testimony by the principal prosecution witness, one Edward Grady Partin, and that they had concealed

evidence of certain tape recordings which the Government had delivered to the Court, but not to counsel for defendants. In this category, Petitioner also charged that the Court had, by its rulings with respect to these prosecution practices, in effect, inadvertently cooperated in the misdeeds of the prosecution. A third category consists of miscellaneous statements by which Petitioner contended that his client was being denied a fair trial.

Of these sixteen incidents, only one occurred in the presence of the jury (R. 3670a-3671a). At no time did the Court ever warn Petitioner that his conduct was considered as contemptuous, and the first indication that the Court was so disposed came at the imposition of sentence for the contempt.

The fourth type of contempt allegedly committed by Petitioner was that he delivered certain tape recordings to the trial judge in a sealed envelope, for the purpose of evading the provisions of Section 605 of the Federal Communications Act (47 U.S.C., § 605), which makes it a criminal offense to disclose the contents of intercepted communications without the consent of a party to such communications.

The contempt certificate is set forth in full as an appendix to the opinion of the Court of Appeals (App. 9-19, *infra*). Inasmuch as the reasons for granting the writ cannot be clearly presented without discussion of the contents of the certificate, we have reserved more detailed discussion of the specific incidents for that part of this petition to avoid burdening the Court with needless repetition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals has enlarged the scope of the contempt power by permitting the imposition of summary punishment, well after the need for immediate control of the proceedings has ended, for acts unnoted at the time they occurred. That decision raises a fundamental question of the extent to which procedural rights guaranteed by the Constitution may be superseded in cases of direct contempt.

This case merits review by this Court because it presents an important question within the general scope of *Sacher* v. *United States,* 343 U.S. 1, which that case did not decide. The issue has vital relevance in the daily operation of the Federal courts and affects fundamental rights of those having business with the courts. It requires resolution and interpretation by this Court for the guidance of trial and appellate judges. It is, whether the summary procedures of Rule 42(a), Federal Rules of Criminal Procedure, which eliminate the due process safeguards of notice and hearing, are applicable when, at the time of the contemptuous act, the court found no need to say or do anything to enable the trial to go on and imposed punishment after any immediate need for such action had passed.

In *Sacher* this court was confronted with the perplexing anomaly of permitting deferral of the exercise of a power, the justification of which is said to be the necessity for immediate action in situations which admit of no delay, to a time when the need for haste had long since terminated. Some judges and commentators were led by that anomaly to conclude that summary proceedings for the punishment of contempts ought not to exist at all. Nevertheless, *Sacher* did permit the reservation of the imposition of punishment

to a time when such action would not itself disrupt the proceedings, provided, however, that the court had taken the minimal steps necessary to bring about compliance with the court's orders by notifying the contemnor of the consequences of his actions. That is what Mr. Justice Jackson referred to when he said for the Court (343 U.S. at 10-11):

> "In this case counsel repeatedly were warned that their conduct was regarded as contemptuous. No claim can be made that the judge awaited the close of the trial to pounce upon them for some offense unnoted at the time it occurred."

This Court did not hold that a trial judge is always justified in deferring all reference to contempt until the end of the trial.

Mr. Justice Frankfurter's dissenting opinion is an exceptionally clear elucidation of the governing principles, as shown by the following excerpts:

> "[Rule 42(a), F.R.Cr.P.] merely permits summary punishment. It does not command summary punishment of all contempts committed in the actual presence of the court, in all circumstances and at any time. That there are unexpressed limits to this power is recognized even by the Government. For it concedes that a judge could not summarily punish contempt without notice and hearing at any undefined time long after it has occurred in his presence." (343 U.S. at 29.)

> "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on . . . The Trial judge was able to keep order and to continue the court's business by occasional brief recesses calculated to cool passions and restore decorum, by periodic warnings to defense lawyers, and by shutting off obstructive arguments whenever rulings were concisely stated and firmly held to." (343 U.S. at 36.)

While Mr. Justice Frankfurter disagreed with the result in *Sacher*, his views nevertheless stated precisely the purposes and limitations of the contempt power as they had been developed in the decisions of this Court. Before *Sacher* and afterwards, this Court has consistently recognized that jurisdiction to dispense with the rights to notice and hearing exists only where it is necessary to protect the very functioning of the court. *Ex parte Terry*, 128 U.S. 289, 311 (1888); *Cooke* v. *United States*, 267 U.S. 517, 536 (1925); *In re Michael*, 326 U.S. 224, 227 (1945); *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *In re McConnell*, 370 U.S. 230, 233-234 (1962).

Nothing in the *Sacher* majority opinion conflicts with the principles stated above. The majority concluded, contrary to Mr. Justice Frankfurter, that the conduct of the defendants warranted the imposition of summary punishment and that deferment of the punishment, as contrasted with notice to defendants, was valid because necessary to avoid disruption of the trial. The majority did not suggest that a court may punish *any* misbehavior summarily or that no notice need be given to the contemnor immediately upon commission of the offense.

Despite the clear attitude of this Court toward summary contempt and its intrusion upon due process, the remedy has generally met with the favor of lower courts. This attitude has resulted, we believe, from basic confusion of the scope of *contempt*, a substantive offense, with the scope of *summary procedure*, a remedy for contempt. Even where the contempt is direct, the scope of the remedy is narrower than the scope of the offense. But many judges seem to have concluded that *all* direct contempts are summarily punishable. Forgetting that the summary procedure is, in effect, a nullification of procedural due proc-

ess, judges provoked by the conduct of attorneys and litigants feel constrained to impose summary punishment without any regard for the question this Court holds to be central—was there an actual obstruction of the authority of the court? *In re McConnell,* 370 U.S. 230, 233-234 (1962).

This tendency of judges to favor the summary procedure reaches its ultimate conclusion in the present case. Here, it is patent that the need for summary proceedings never existed because the trial judge never saw fit even to threaten petitioner with discipline of any kind. It is true that on occasion the judge did ask petitioner to be quiet and the like. However, in the very few instances when even this happened, these methods obviously were effective to control his conduct and could not have been construed as a warning that contempt proceedings were contemplated. Never did the trial judge find it necessary to use the ultimate weapon, known to every lawyer who has become involved in heated controversy at trial: the promise that one more indecorous act will result in contempt proceedings. Despite the absence of such drastic action, the trial did proceed to a conclusion, petitioner's client was convicted, and that conviction has been affirmed by the Court of Appeals.

The Court of Appeals recognized that no warning was given to petitioner, except possibly on one occasion, when the trial judge ambiguously remarked that a matter would be taken up later (R. 3671). However, this was the only instance where any specification of contempt occurred in the presence of the jury. The Court of Appeals characterized this statement as a *clear* reference to future contempt proceedings, but the conclusion is more reasonable that the reference was merely to take up the legal arguments later when the jury would be absent. In any event,

the Court of Appeals must have realized that one such warning could not suffice for seventeen specifications of contempt, five of which had already occurred at the time of the warning. Thus, the Court stated (App. 6) that the giving of notice is the better practice, but is not required ". . . where, as here, the conduct is clearly contemptuous." That misses the point. It assumes that the only reason for the warning is to advise a party who might be in doubt that his conduct is in fact contemptuous. The principal reason for requiring such notification, however, is to then and thereby control the proceedings and stop any *further* contemptuous conduct. That did not happen here.

The net result is that the Court of Appeals has approved a very substantial enlargement of a mode of procedure at odds with the most rudimentary requirements of due process. Where due process is eliminated for reasons of expediency, the procedures followed should be narrowly construed rather than have the scope of their application broadened. The opinion of the Court of Appeals does not squarely face the issue in these terms and is, to that extent, an alluring and deceptive precedent for trial judges seeking support for improvident action against lawyers or litigants who have incurred their ire. If an extension is to be made in this exception to due process, then this Court should make it. If, however, the decision below is built upon erroneous principles, as we earnestly contend, now is the appropriate time for this Court to so hold, lest further erosion of fair procedure occur in contempt cases, and so that trial judges may know to a practical certainty the extent of the power to employ this extraordinary procedure.

2. The decision below raises important questions respecting the right to trial by jury and the extent of punishment in cases of direct contempt, including a constitutional question substantially identical to one now pending before this Court.

Shortly after judgment had been entered in this case, this Court announced its opinion in *United States* v. *Barnett*, 376 U.S. 681, (1964). The Court held that the Constitution does not guarantee the right to trial by jury in contempt cases. But a *dictum* suggests that the Court may hold that, ". . . without regard to the seriousness of the offense, punishment by summary trial without a jury [will] be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695, fn. 12. We believe it reasonable to assume that the Court will decide the issue raised by the *dictum* this term, in view of the grants of certiorari in *Harris*, No. 6, *Cheff*, No. 67, *Skillitani*, No. 412, and *Pappadio*, No. 442.

In this case the court imposed a sentence of sixty days imprisonment and a $1,000 fine. The sixty days imprisonment is within the maximum provided for petty offenses, but the $1,000 fine is twice the maximum permitted for such offenses. 18 U.S.C., § 1. Moreover, the imposition of *both* fine and imprisonment for contempt was illegal. 18 U.S.C., § 401; *Re Bradley*, 318 U.S. 50, 52 (1943).

After the decision in *Barnett* and after the Court of Appeals had acquired jurisdiction in this case, the trial judge entered an order, on his own motion, purporting to strike the fine from the judgment. If effective, this action would have cured the illegality of the sentence and would have conformed it with the *Barnett dictum*. We contend that the order was invalid, for the reasons stated in Part 3, *infra*. We also contend, however, that petitioner was unlawfully denied the right to trial by jury, even if the trial judge had jurisdiction to correct the sentence. Inasmuch as *Cheff*, No. 67, raises the constitutionality of the imposition of imprisonment *within* the limits for a petty

offense, without trial by jury, we respectfully submit that the sentence imposed on petitioner, absent a jury trial, raises substantially the same question under the Sixth Amendment.

The *Barnett dictum* refers to a statement of Mr. Justice Stone in *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937). The full paragraph reads as follows:

> "We are aware that these standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes; in some cases which were triable without a jury when the Constitution was adopted. But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."
>
> —(300 U.S. at 627-628; footnote and citations omitted.)

It is apparent that the considerations which may motivate this Court to limit the penalty in summary contempt are the very considerations which Mr. Justice Stone discusssed. It is equally apparent that the issue cannot be determined by uncritical application of the definition of "petty offense" found in 18 U.S.C., § 1. That approach would assume that 18 U.S.C., § 1, reflects the judgment of the community on the matter, yet the community standard is the point to be proved. The statutory scheme is rele-

vant evidence of what that standard is, but the weight of the evidence may well differ.

We believe the weight of the evidence is that the penalties applicable to "petty offenses" are more severe than is appropriate in determining when trial by jury can be dispensed with. We believe the correct contemporary view is that no sentence of imprisonment can be imposed without trial by jury in cases of direct contempt.

Standards of severity in sentencing do change, as Mr. Justice Stone observed. It cannot be doubted that the direction of change in our jurisprudence is toward shorter terms and less severe conditions of confinement. Rehabilitation has supplanted vengeance as the object of penal law; supervision and money fines are the rule, not the exception, particularly as respects first offenders. Thus confinement, with its attendant disgrace and indignity to the offender, is regarded as a greater evil than it was in 1789, or even in 1937. Our law has imposed correspondingly greater safeguards to assure that no one will be imprisoned except after scrupulously fair proceedings wherein the defendant has had every opportunity to vindicate himself.

In cases of direct contempt, however, the trend among lower courts has been to the contrary, as Mr. Justice Clark said in *Barnett* (376 U.S. at 695). Not only have sentences been longer, but the inherent power of courts to act summarily in contempt cases has been vigorously defended in countless decisions. No valid reason for this counter-trend is apparent. No one would suggest that trial judges today are less capable of controlling proceedings before them than formerly or that lawyers and litigants are more unruly. It seems that judges have become more jealous of what they deem their prerogatives, and that they are quicker to demand retribution for infractions by summary punishment.

Where, as in the instant case, a lawyer is to be jailed for his conduct as a trial advocate, the penalty cannot be described as trivial or insignificant. Thanks to media of communication unknown in the early days of the Constitution, it may well have results reaching far beyond the weeks or months of actual confinement. Potential clients will seek other counsel; old clients may lose confidence; and, above all, both professional reputation and professional privileges may hang in the balance.

Notwithstanding all of this, the court of appeals held, in effect, that these consequences are of so little significance that the right of trial by jury ordinarily afforded to the humblest misdemeanant will here be denied. The net result is that petitioner's freedom and reputation are to be impaired without notice or right to be heard, and by a judge who, at the same time, is both prosecutor and complaining witness. We respectfully submit that this Court should hear this case to determine whether, under present constitutional standards of fairness, the consequences of conviction were of such gravity to demand trial by jury.

3. The interpretation of Rule 35, F.R.Cr.P., by the court below, so as to permit the District Court to correct an illegal sentence during the pendency of an appeal, is in apparent conflict with the basic policy of the Rules and with the interpretation of at least one other circuit.

At the time when the District Court corrected the concededly illegal sentence imposed in this case, the appeal had already been docketed in the Court of Appeals, and remandment was never ordered or requested. Neverthless, the Court of Appeals held that the District Court had the power to correct an illegal sentence during the pendency of the appeal by virtue of Rule 35, F.R.Cr.P., which permits the Court to correct an illegal sentence "at any time".

It appears that this precise question has never before been decided. It is an important question because the concept that appeal ousts the District Court from jurisdiction (except as respects routine matters necessary to perfect the appeal) has been a central one in both the criminal and civil rules. (F.R.Cr.P., Rule 39, F.R.C P., Rules 73-75; *Berman* v. *United States,* 302 U.S. 211, 214 [1937]). Any other approach would foster confusion and uncertainty as to what judgment or Order the court of appeals has before it on review.

United States v. *Grabina,* 309 F.2d 783, 785 (CA 2, 1962), supports this analysis. There, defendant had been sentenced, and an appeal had been taken from the judgment. During the pendency of the appeal, defendant filed a motion challenging the sentence for illegality. (Compare the instant case, where the court acted upon its own motion). The District Court entered an Order purporting to vacate the sentence and to impose a different sentence. The Court of Appeals held that Order to be null and void because the District Court lacked jurisdiction to enter it without remandment. The Court made no express reference to Rule 35 in its opinion, but it seems that the Court could not have deemed the rule to be applicable.

It would be unreasonable to construe Rule 35 to cut so deeply into the jurisdiction and procedure of Appellate Courts, because nothing on its face hints that its framers intended to carve out an exception to the usual rule. On the contrary, wherever any exception to this usual procedure was intended, the Rules clearly grant such authority to the District Courts. See especially Rule 33, F.R.Cr.P., which permits the District Court to grant a motion for new trial only upon remand. If our view is correct, the sentence affirmed by the Court of Appeals was necessarily the original sentence, which was illegal on its face as well as in excess of the maximum permitted for petty offenses.

We respectfully suggest that the opinion below is an unfortunate gloss upon Rule 35 which this Court should remove, in its capacity as promulgator and interpreter of the Federal Rules.

4. Petitioner was convicted in summary proceedings for acts not occurring in the presence of the Court.

Part IV of the Specifications (R. 3582a-3583a) charges that Petitioner committed contempt by delivering certain tape recordings to the trial Judge in a sealed envelope on one occasion and by attempting to do so on another occasion. The Court held that Petitioner's intention in doing this was to use the trial Judge as a tool through whom Petitioner would violate Section 605 of the Federal Communications Act (47 U.S.C., §605) without the criminal liability which attaches to the unauthorized disclosure of matter intercepted from a communication regulated by the Act.

This holding flies in the face of well-established constitutional principles. The Court presumably found that Petitioner's intention was to escape the guilt which otherwise would have attached under this language of Section 605:

> " . . . and no person having received such [unlawfully] intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof . . ."
> (See Court of Appeals Opinion, pp. App. 6-7, *infra*)

Yet there was no showing that Petitioner had received or become acquainted with the contents of any communication; or that Petitioner knew that the interception had

been unlawful. Moreover, under 47 U.S.C., §501, the penalty section of the Act, the offense is not complete unless the violation shall have been committed wilfully and knowingly. These are elements of the offense. If any of them was absent, Petitioner's conduct was innocent, and blameless conduct could no more be the basis of a contempt citation than of an indictment. The Court could not have known without proof whether these elements existed, since they clearly did not occur in the presence of the Court. But the Court found as fact that they did exist, specifically stating that Petitioner believed the communications to have been unlawfully intercepted. The substance of what the Court did was to assume the necessary facts, and then to deny Petitioner the rudimentary rights which are indispensable to the fair resolution of any issue of fact.

The vice of these procedures is too clear for debate. This Court has expressly condemned them, holding that a contempt based on any fact not occurring in the actual presence of the Court may not be heard summarily. *Pendergast* v. *United States,* 317 U.S. 412, 419-421 (1943); *Nye* v. *United States,* 313 U.S. 33, 51 (1941); *Ex parte Savin,* 131 U.S. 267, 280 (1889). Their use in this case was far more than a mere error. It was a flagrant rejection of the most cherished elements of procedural due process—the right to a trial based on evidence openly presented, not a a trial based on guess, conjecture or secret evidence. This Court should intervene to undo the manifest injustice of the proceedings and to make it crystal-clear that fundamental rights will not yield to a supposed interest in judicial self-preservation or to any other end, however laudable.

5. The courts below held petitioner in contempt for conduct which had no obstructive effect on the trial. That holding is patently contrary to the rule announced by the decisions of this Court.

The contempt certificate contains seventeen specifications. A review of the case on the merits would require us to discuss each of these specifications in detail, as we did in the briefs filed in the court of appeals and as we will do if certiorari is granted. Since a discussion of that sort would unduly burden a petition for certiorari, we will therefore summarize and illustrate, rather than fully report, the occurrences in the record.

Parts I, II and III of the specifications all deal with oral statements of petitioner which the trial judge deemed offensive. (Part IV is separately discussed as Reason 4, *supra.*) The judge characterized the occurrences under Parts I and III as attempts to provoke error, delay or mistrial, to create confusion, and to exert improper pressure on the court in ruling on motions and objections. The incidents set forth as Part I all involve the use by petitioner of such terms as "drum-head court-martial" and "star chamber proceeding". The incidents under Part III also involve charges of unfairness, but without the invidious terminology. The acts sef forth in Part II are all allegations that various actions of the court resulted in the concealment of relevant evidence.

The court of appeals did not decide that petitioner's acts were contemptuous, it merely assumed so. The court simply equated epithetical argument with contempt of court. But the decisions of this Court prove there is no such equation. Those decisions hold that no rudeness or lack of decorum is summarily punishable as contempt unless it is clearly shown that the defendant's acts actually

obstructed the performance of judicial duty. *In re McConnell,* 370 U.S. 230, 233-234 (1962). Absent that showing, the court may not act because it has only enough power to suppress such actual obstructions. *In re Michael,* 326 U.S. 224, 227 (1945). Thus the rights of notice and hearing implicit in due process never yield to the interest in the orderly conduct of litigation except in case of necessity. And necessity in this context does not mean expediency; it means indispensability.

In the instant case it was unnecessary for the court to resort to the contempt power. Hence there was no power and there was no contempt. That is demonstrated by the nature of the occurrences and by the court's reactions when they happened, as shown by the record:

(A) With but one exception (R. 3670a-3671a), petitioner's conduct occurred outside the presence of the jury. That conduct, therefore, lacked the most serious element of any contempt—interference with the integrity of the fact-finding process. Compare cases such as *Hallinan* v. *United States,* 182 F.2d 880 (C.A. 9, 1950), and *Robles* v. *United States,* 279 F.2d 401 (C.A. 9, 1960), where inflammatory argument to the jury was contemptuous precisely because it was calculated to frustrate the jury's function.

Only one act took place in the presence of the jury (R. 3670a-3671a). It occurred during a motion for mis-trial and for leave to withdraw as counsel because of the persistence of the witness Partin in giving non-responsive and argumentative answers on cross-examination. This incident was short, it was dealt with firmly and effectively by the court, and it was the obvious result of provocation authored by the government witness. Surely its tendency could not be construed as disruptive of the trial, as was the conduct in the cases cited above, because, in those cases, the contemnors persisted in inflammatory argument despite the efforts of the court to suppress it.

(B) At no time did the court threaten petitioner with contempt proceedings. On the contrary, the record shows in incident after incident that the court was fully capable of dealing with the conduct of all counsel, including petitioner, by the exercise of the moral power and prestige of his office. This is the ordinary way in which judges control the passions of participants. When it is effective, as it was here, there is no need for resort to the extraordinary method of contempt.

Moreover, the record proves that the trial judge did not himself feel that the proceedings had ever gotten out of hand or that the imposition of punishment was necessary. On the contrary, he firmly controlled any excessive argument on the rare occasions when he thought that necessary; but on most occasions his reaction was bland. He would say, "all right", or he would ask for a citation, or, quite often, he would say nothing at all. This fact is relevant because it enables a reviewing court to measure the seriousness of the situation as the trial judge saw it at the time, not as he chose to view it later. *Parmelee Transportation Co.* v. *Keeshin*, 294 F.2d 310, 313 (C.A. 7, 1961), rev'd 370 U.S. 230 (this Court reversed the court of appeals on the one specification which that court had upheld, letting stand the decision of the court striking all other specifications of contempt). In view of this record, the conclusion is inescapable that the purpose and effect of the punishment here imposed was to punish petitioner for his completed acts, not to control the proceedings before the court.

(C) Petitioner frequently used invidious terms, such as "star chamber proceeding" and "drum-head court martial." The burden of these expressions, however, was not that the trial judge was consciously conducting such a pro-

ceeding; it was that the government was attempting to obtain that kind of trial and that, to the extent the attempt succeeded, the court had been a mere instrument of the prosecution.

We do not contend that the use of such terms is a decorous way to conduct any trial. But the question is not one of decorum. Rather, it is a question of whether the conduct obstructed the trial. We do contend that it did not, and we submit that to hold it did would amount to holding that this trial judge was deterred from the course of his duty by that kind of argument. Of course, such an effect would never be presumed, and the record in this case belies it. It shows that the trial judge remained calm and in control of the situation at all times, in the face of continuous and heated controversy among all counsel.

(D) The contempt certificate accuses petitioner of plotting a course of conduct for the purpose of disrupting the trial. That charge, if substantiated by the record, would justify a comparison of this case with *Sacher* v. *United States*, 343 U.S. 1, but the record does not support it.

Few cases have been tried in more difficult circumstances. The publicity attendant on the proceedings was intense because Hoffa is a controversial personality of national prominence, because the charges themselves are sensational, and because it was the culmination of a long history of conflict between Hoffa and the then Attorney General. Moreover, the government's case was built on the testimony of one Edward Grady Partin, a person of despicable character whose bias and interest were manifest. His credibility and his dubious relationship with the prosecution were central issues in the trial, and his demeanor on the stand was a source of constant strife among the oppos-

ing lawyers. Many of the incidents which were held contumacious involved this witness. As if this were not enough, all counsel for the defendants felt that the prosecution was conducting a surveillance of them and their clients during the course of the trial, and all of them repeatedly demanded a hearing on this issue, which was denied until the trial had been concluded. Again, much of petitioner's alleged misconduct concerned this issue.

These circumstances, coupled with the length and complexity of the trial, had a telling effect on the lawyers for both sides. The record reveals countless examples of frayed tempers, personal asides and vociferous argument. The court singled out petitioner as guilty of contempt, concluded that he had plotted the upset of the trial, and imposed a substantial penalty. Yet, in contradiction of his basic premise, the trial judge recognized that overzealous argument can often occur in the heat of trial, but said that he could not construe petitioner's conduct as of that kind (R. 3877a). Yet there is nothing to substantiate the existence of any plan or scheme. The trial was not disrupted or upset in any way. The alleged plot was executed in a very ineffective manner, because the obvious way to bring about a mistrial or reversal is to prejudice the jury, yet petitioner only once committed an allegedly contemptuous act before the jury, and then under obvious provocation. In short, there was no plot. The actions of this petitioner, over the course of a six-week trial, were not, either in purpose or effect, calculated to interfere with the judicial process, especially when weighed in the light of the trial situation which did exist.

The foregoing reasons indicate that the decision of the court of appeals is in error. While the fact that a court has erred cannot be the principal basis for this Court to exercise its discretionary power of review, the subject matter of the errors here involved cries out for such review. Nothing could be more fundamental to the administration of justice than the dealings of a court with those appearing before it, and nothing could be of more basic constitutional significance than the expansion of a power not affected by rudimentary due process requirements.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

(Filed Sept. 9, 1965)

No. 15886

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACQUES M. SCHIFFER,
Defendant-Appellant.

APPEAL from the United States District Court For the Eastern District of Tennessee.

Decided September 9, 1965.

Before: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

WEICK, Chief Judge. This is an appeal from an order of the District Court adjudging Appellant Schiffer guilty of criminal contempt and imposing upon him a sentence of sixty days' confinement and a fine of $1,000. The sentence was later corrected by striking therefrom the fine.

Schiffer was Thomas Ewing Parks' attorney in the case of *United States* v. *James R. Hoffa, et al.,* in which the defendants were tried and convicted for jury tampering. These convictions were affirmed by this Court. ..... F.2d ..... (Nos. 15,876-15,879 1965) Immediately after the defendants in the *Hoffa* case were sentenced, the trial judge read

into the record a contempt certificate made pursuant to Rule 42(a) Federal Rules of Criminal Procedure.[1] After permitting Schiffer to make a statement, the Court imposed sentence. Motion for a new trial was later filed and denied.

The contempt certificate set forth under four headings divided into sixteen parts the acts, statements and conduct of Schiffer during the six and one-half weeks' trial of the *Hoffa* case, which acts, statements and conduct took place in the actual presence of the Court and were seen or heard by it. The Court found that they constituted a deliberate and wilful attack upon the administration of justice, an attempt to prevent by improper means the functioning of the Court, and an attempt to degrade and debase the Court. The Court found that such conduct would be calculated to destroy all respect for the Court by attorneys and the public if it went unnoticed and unpunished. The Court regretted that he was compelled to take such action.

The District Judge in his certificate stated that full appreciation of the extent of misconduct and criminal contempt could only be learned by actual presence in the court room and actual observation of the manner in which Schiffer conducted himself throughout the trial. The Court made the entire record of the trial a part of the contempt proceedings in order that the specific acts of misconduct could be viewed in proper context.

The statements of Schiffer, found contemptuous by the Court, were his repeated charges that the Court was conducting a "drum head court martial", and "a star chamber proceeding". He stated that the Court's rulings "smacked of Stalinism, Hitlerism, Mussoliniism, and all these isms". These offensive and derogatory statements

[1] The contempt certificate is appended at the end of this opinion.

were made to the Court seven times during the course of the trial. On one occasion Schiffer accused the Court of "being used as a tool by the Government" to deprive the defendant of putting on his defense.

Schiffer further accused the Court of

> ". . . being used as an adjunct to the prosecutor to hide evidence . . ."

and stated:

> "This is chicanery, not law."

He insinuated that the case was only "a trial technically begun." He stated that the prosecutor "runs to the aid of an affiliate, the Court".

He further accused the Judge of concealing evidence known by him to be perjured, and of keeping Schiffer's mouth closed so that he could not attack it.

He asked the Court to permit him to withdraw from the case and for the Court to defend his client because he was being prevented from defending him.

When the Court sustained an objection to the testimony of a witness in a collateral matter, Schiffer stated:

> "Well, Your Honor, may I say this, if in this United States of America we have sunk to the low point in a United States court where a witness for the prosecution commits treason, with the knowledge of the prosecutor, and we are to be prohibited on defense from exposing that kind of a dirty, vicious deal, justice is finished in America."

The Court warned Schiffer to keep his voice down when he was shouting, and to stay within the law. He was also cautioned about arguing matters in the presence of the jury which were not appropriate for argument, and the Court indicated that the matter would be taken up at a later time.

It is not disputed here that Schiffer made the statements attributed to him in the presence of the Court.

Schiffer contends first that we have no jurisdiction to sustain the contempt order on the basis of any fact not specifically recited in the contempt order. We make no attempt to do so. Our opinion is based on the facts specifically set forth in the contempt certificate. The District Court made the entire record a part of the certificate in order that the remarks specifically set forth therein could be taken in context. This was in accord with the procedure followed in *Sacher* v. *United States*, 343 U.S. 1 (1952). See also *MacInnis* v. *United States*, 191 F.2d 157 (C.A. 9, 1951), cert. denied 342 U.S. 953; *Hallinan* v. *United States*, 182 F.2d 880, 882 (C.A. 9, 1950), cert. denied 341 U.S. 952, rehearing denied 342 U.S. 956.

Appellant next contends that the conduct specifically set forth in the contempt certificate did not constitute criminal contempt We do not agree. We think the remarks were contemptuous per se. *Sacher* v. *United States*, supra; *MacInnis* v. *United States*, supra; *United States* v. *Hall*, 176 F.2d 163 (C.A. 2, 1949), cert. denied 338 U.S. 851. The fact that all except one of them did not take place in the presence of the jury did not make them any the less contemptuous. They were calculated to provoke and to bring undue pressure upon the Court in the making of various rulings during the course of the trial. They delayed the trial, obstructed the administration of justice and interfered with the Court in the performance of his judicial duties.

We realize that in contempt cases against lawyers the evidence must be carefully scrutinized in order that there be no undue interference with their right to properly represent their clients. In the present case the evidence must

be viewed in the background of a bitterly contested trial charged with emotions, where things are sometimes said that should have remained unsaid. Here, however, we do not have an isolated outburst in the heat of a trial, but rather deliberate, continuous and repeated acts, extending throughout the trial, which were wholly unwarranted.

It may be conceded that Schiffer had full right to present forcefully to the Court his claims in order to obtain a ruling, even though the presentations may be far fetched and untenable. After he had obtained the ruling he had no right to resist it nor to insult the Judge. *Sacher* v. *United States,* supra. If he felt that a ruling was erroneous, he had an adequate remedy to review it by way of appeal. Schiffer not only resisted rulings, but he repeatedly insulted the Court. He made unfounded accusations reflecting on the dignity, integrity and impartiality of the Court. This conduct cannot be countenanced in a Federal Court.

The Supreme Court laid down guidelines in *Sacher* for counsel to follow in the trial of cases. They were not adhered to by Schiffer.

We find no merit in the claim that since the Court did not bring the contempt charge at the time the acts were committed, there was no obstruction of justice. There were many contemptuous acts. The Court could have punished Schiffer summarily at the time each of the acts was committed. Had he done so, it might have prejudiced the client, delayed the trial, or resulted in a mistrial. It was discretionary with the Court whether to act at the time or to postpone action until after the trial. *Sacher* v. *United States,* supra; *MacInnis* v. *United States,* supra. We find no abuse of discretion.

Unlike *Sacher* and *Offutt* v. *United States,* 348 U.S. 11 (1954), the Judge did not become personally involved or embroiled. He had no personal interest in holding Schiffer in contempt. The Court had infinite patience. He did not engage in wrangling or bickering with counsel. He did his utmost to preserve order and decorum.

It is argued that the Court did not warn Schiffer that the acts which he was repeatedly committing would be punished by contempt. As we pointed out before, the Court did state on one occasion that the matter would be taken up at a later time. He also told Schiffer to keep his voice down, to sit down, and to keep within the law.

While warnings have been given by Courts in some of the cases,[2] and we deem this practice generally desirable, we do not believe warnings were essential where, as here, the conduct was clearly contemptuous. *MacInnis* v. *United States,* supra; 17 C.J.S. Contempt, § 25, pp. 67, 68 (1963). In any event, in the context in which the Court stated that the matter would be taken up at a later time, we believe that no lawyer in the courtroom could have failed to understand that this was a warning pertaining to contempt.

Specification IV charged Schiffer with an attempt to evade personal guilt under 47 U.S.C. 605 for disclosing intercepted communications by contriving to have the Court, rather than himself, reveal them.

Schiffer had filed a motion for a mistrial and delivered to the Court in a sealed envelope as an exhibit to the motion a transcript of radio communications of the F.B.I., which

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[2] *Ungar* v. *Sarafite,* 376 U.S. 575 (1964); *Sacher* v. *United States,* supra; *Fisher* v. *Pace,* 336 U.S. 155 (1949).

an expert in electronics, employed by Schiffer, had intercepted.[3] Schiffer served a copy of the motion on counsel for the Government, but not of the exhibit. The Court, not being informed of what the envelope contained, opened it, read the exhibit and made it a part of the record. Schiffer stated at a hearing that he had not given a copy to the Government "because of the subject matter which it contained in view of the state of the law which we did not want anything published."

At a later date Schiffer sought a second time to tender additional sealed F.B.I. radio communications, but the Court refused to receive them unless they were tendered in open court. No one was willing to divulge the contents of the exhibit unless the Court would order it opened. This the Court declined to do.

Schiffer believed it would be unlawful if he [Schiffer] divulged the intercepted radio communications, and therefore he endeavored to have the Court make the disclosure without informing the Court of his purpose and of the consequences. He persisted by making a second tender of additional communications.

It is urged that in order to determine whether this conduct constituted contempt, it would be necessary to consider evidence which took place out of the presence of the Court. We do not think so.

The acts of Schiffer which he committed in open court, in our opinion, constituted contempt. He was trifling with the Court and making its processes a mockery. Cf. *Clark* v. *United States*, 289 U.S. 1 (1933).

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[3] The background concerning the interceptions appears in our opinion in *United States* v. *Hoffa*, supra, and need not be repeated here.

Lastly, Schiffer contends that the District Court was without jurisdiction to correct the sentence after the appeal had been taken. *Berman* v. *United States,* 302 U.S. 211 (1937). We think this point is without merit.

The sentence as originally imposed was illegal since only a fine *or* imprisonment may be imposed for criminal contempt. 18 U.S.C. 401; *In re Bradley,* 318 U.S. 50 (1943).

Rule 35, Federal Rules of Criminal Procedure, provides that "the court may correct an illegal sentence at any time". Cf. *Corey* v. *United States,* 375 U.S. 169 (1963).

The appeal was actually taken in the present case before the motion for a new trial had been passed on by the District Court. This did not prevent the District Judge from ruling on the motion for a new trial. We think he also had jurisdiction to correct the illegal sentence.

The sentence as corrected was within the permissible limits for a petty crime. 18 U.S.C. 1. Schiffer was not entitled to a jury trial. *United States* v. *Barnett,* 376 U.S. 681 (1964).

Affirmed.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

UNITED STATES OF AMERICA
vs.
JACQUES M. SCHIFFER
} Criminal No. 12010

CONTEMPT CERTIFICATE

Pursuant to Rule 42(a), Federal Rules of Criminal Procedure, 18 U.S.C., I hereby certify that the following criminal contempt was committed in the actual presence of the Court and was seen or heard by the Court during the trial of the case of *United States* v. *James R. Hoffa, et al.*, Criminal No. 11,989, which trial commenced upon January 20, 1964, and continued from day to day thereafter through March 6, 1964.

I find that the acts, statements, and conduct of Jacques M. Schiffer, the defendant in this contempt petition, hereinafter specified constitute (1) a deliberate and wilful attack upon the administration of justice, (2) an attempt to prevent by improper means the functioning of this Court, (3) an attempt to degrade and debase this Court, and (4) such misconduct by an attorney-at-law in practice before this Court as would be calculated to destroy all respect for this Court both by attorneys-at-law in practice before this Court and by members of the general public if such misconduct went unnoticed and unpunished by this Court.

Jacques M. Schiffer was the attorney of record in the above entitled cause of *United States* v. *James R. Hoffa, et al.*, on behalf of the defendant, Thomas Ewing Parks,

and appeared upon his behalf each day throughout the trial. By reason of his misconduct as hereinafter set forth the task of maintaining order and proceeding with a proper and fair trial was rendered extremely difficult. A full appreciation of the extent of the misconduct and criminal contempt of the defendant, Jacques M. Schiffer, can only be learned by actual presence in the court room throughout this trial and actual observation of the manner in which Mr. Schiffer conducted himself and actual hearing of the matters stated by him throughout the trial. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements and conduct herein referred to, I hereby make the entire record a part of this proceeding.

I. Mr. Schiffer repeatedly and throughout the trial of this case engaged in abusive and insulting argument to the Court, wilfully and deliberately seeking to provoke the Court into taking action that might form a basis for some alleged error or cause delay in the trial or form some basis for a mistrial. He repeatedly charged the Court with operating a "*drum head court martial,*" conducting a "*star chamber proceeding,*" and suggesting that the Court's actions "smacked of Stalinism, Hitlerism, Mussoliniism, and all kinds of isms."

(a) Upon Wednesday, January 22, 1964, as set forth in Volume 4, p. 754 of the transcript, Mr. Schiffer stated in argument:

> "I think what the government wants is not a fair trial guarantee(d) under the Constitution. They want a drum head court martial kind of trial or similar proceeding."

(b) On Monday, January 27, 1964, as set forth in Volume 7, p. 1375 of the transcript, Mr. Schiffer stated in argument:

> "In no event can Mr. Parks select a jury of his peers as contemplated by the rules of American justice as laid down by the United States Supreme Court and I can only appeal to Your Honor that in all fairness that this man be afforded a fair trial within American principles and if he is to be deprived of his free voice and choice of who sits among his peers, then I say the govment has succeeded in attempting, and has actually at this point managed, to secure a drum head court martial trial."

(This argument was made in response to the Court limiting peremptory challenges to alternate jurors to two in number, as expressly provided in Rule 24(c), Federal Rules of Criminal Procedure.)

(c) On Wednesday, February 5, 1964, as set forth in Volume 14, p. 3431 of the transcript, Mr. Schiffer in reference to a ruling of the Court with regard to an alleged Jencks Act document stated:

> "Why it smacks of a star chamber proceeding where one is given what the government wants it to have and then deprived of what their ultimate defense can possibly be."

(d) On Friday, February 7, 1964, as set forth in Volume 16, p. 3835 of the transcript, Mr. Schiffer stated in argument:

> "Number one, I advised the Court that the government from the inception of this case would try to run a drum head court martial case and not the kind of case contemplated by the American laws and rules of justice. What has happened here, your Honor, day after day, has proved my point that this is precisely what

the government wanted and they succeeded in obtaining it"

At p. 3840 in the same argument, Mr. Schiffer stated:

"I object to that. It has never happened in my experience. I have read about these things in cases and I object to this kind of procedure. That is the drum head court martial they wanted and they are getting it. They are getting it to the last vestige of the meaning of a drum head court martial and they are getting a star chamber proceeding here. Not a trial in a federal court of a man charged with a crime."

In the same argument at p. 3846, Mr. Schiffer stated:

"I will offer no objections to whatever the government wants to put into this case because the Court in fact has stayed my tongue and the integrity and respect for a court of the United States stands equally with my house of worship to God and when I see someone defile that he better know he is in for a battle, but if I am to be stilled in making my proper objections and seeking a legal lawful procedure of American justice, then I state to Your Honor if I am not relieved I will make no objections to what I call a drum head court martial proceeding and this is the kind of thing I told the Court the government wanted in the beginning and in effect the Court is giving to them what they wanted."

(e) On Tuesday, February 11, 1964, as set forth in Volume 18, p. 4478 of the transcript, in response to a ruling of the Court that a hearing would be granted unto the defendants upon their motion with regard to alleged surveillance, but that the trial would not be interrupted at that particular point for the purpose of conducting the hearing, Mr. Schiffer in argument stated:

"It is only you in this case who has the initial power to remedy this evil and if this evil is not remedied now and a hearing held now, Your Honor is being used as a

> tool by the goverment and another agency of the government to see to it that in effect, in any legal true sense, Parks is deprived really from putting in his defense which are guaranted to him by the basic law of this country and I say this, that smacks of Stalinism and Hitlerism and Mussoliniism and all these isms that this country has spent all of its precious blood to keep away from our shores."

(f) On Tuesday, February 25, 1964, as set forth in Volume 28, p. 7199 of the transcript, in response to the Court making available to the defendants transcripts of telephone conversations, Mr. Schiffer in argument stated:

> "What recourse is there to this except to say to the Court, as I said the last time, in the *United States* v. *Berger* case, I have spoken of it twice, which states what the rules of this kind of game are, that we are not playing a game, we are in a court of justice, that when the prosecution does these things the Court is not supposed to commend them. This is a foreign kind of thing they have introduced here. This is a Russian concept of justice. The Nazis."

As a part of the same argument at p. 7202, Mr. Schiffer stated:

> "Your Honor will remember I called it, and I call it again for this purpose, that the government insisted on a drum head court martial. That is what we have now, right up to this point, and now that they are exposed they want Your Honor now to convert this further and feloniously, they now ask Your Honor to make it a star chamber proceeding and that is why I ask for the mistrial at this time."

II. Mr. Schiffer repeatedly charged this Court and another federal judge involved in proceedings related to this case, with aiding and assisting in the commission of perjury by witnesses or in the protection or concealment of alleged perjuries.

(a) On Wednesday, February 5, 1964, as set forth in Volume 14, p. 3430 of the transcript, in response to the action of this Court in making available to the defendants an affidavit of the witness Partin, Mr. Schiffer stated in argument:

> "A judge [*i.e.*, Judge William E. Miller, U.S. District Court, Middle District of Tennessee] sat in the first case knowing what was in the envelope and had continued the trial. I believe that was a violation of every concept of due administration of justice."

(b) On Thursday, February 13, 1964, as set forth in Volume 20, pp. 4934-4943 of the transcript, upon the Court quashing a *subpoena duces tecum* that was too broad upon its face, Mr. Schiffer engaged in prolonged argument upon an unrelated issue not then before the Court or in any wise then ruled upon by the Court involving admissibility of testimony on collateral issues, stated:

> "We are going to secure that and supply it to Your Honor, but I am saying to Your Honor now, the witness is here, the records are here, how can the Court then at this time take the position and say to defendants, well, even though he is here and the records are here to show the government witness committed perjury, I am not going to permit it because the government says it is a collateral matter."

Continuing in the same line of argument, at pp. 4941, 4942, and 4943, Mr. Schiffer stated:

> "Now, I say insofar as this testimony, Your Honor, Your Honor has now effectively closed the door to the defendant Parks who finds himself here unwillingly joined in an indictment with all of these other parties. You have now said to Mr. Parks, 'Sit and keep your mouth closed. Keep your lawyer's mouth closed, too. Because even though there is a man who is alleged to have committed perjury for the prosecution I am going

to let it in, you can't attack it.' That is what I have been told just now in every real sense."

"How do we defend a case here? I say that in itself is an attribute of an unfair trial. How do you want me to defend a man, Your Honor? He doesn't need a lawyer here, he needs a pallbearer."

(c) On Thursday, February 20, 1964, as set forth in Volume 25, p. 6508 of the transcript, in response to the Court advising the defendants that the government had filed with the Court two IBM tapes that purported to be recordings of telephone conversations, Mr. Schiffer in argument stated:

"Now then how can the Court, I beg of Your Honor, how can the Court be used as an adjunct to the prosecutor to hide evidence and nowhere in the record disclose that these are recordings?"

In the course of the same argument at p. 6510, Mr. Schiffer stated:

"That is how they avoided obeying the law. I say that so far as the defendant Parks is concerned I move for a withdrawal of a juror at this time and I move for a mistrial and a severance because Parks can no longer be, even on any plane, be argued that he was given a fair trial even by the prosecution and relying upon *United States* v. *Berger* I say to Your Honor, I say this with complete felicity to you and with my own integrity, and I don't put my own integrity second to anybody alive, and I say to Your Honor that at the very minimum Mr. Parks is entitled to that relief. This is chicanery, not law."

(d) On Thursday, February 27, 1964, as set forth in Volume 30, p. 7831 of the transcript, Mr. Schiffer stated in argument:

"Your Honor permitted a wilful perjurer, and I say now Your Honor had the proof weeks ago that he was

perjuring himself on material issues, you knew he was put in by the government, we were not told about that. We were left to find it by chance, but the truth will always out."

III. Mr. Schiffer engaged in repeated abuse and maligning of the Court throughout the trial to such an extent as to indicate a deliberate and studied attack on the administration of justice, a wilful attempt to cause delay and confusion, and an intention to seek by abuse to improperly pressure the Court in making of rulings upon objections and motions.

(a) On Monday, January 27, 1964, as set forth in Volume 7, p. 373 [*sic.*, 1373] of the transcript, in response to the Court stating the rule with regard to peremptory challenges of alternate jurors, all as specifically set forth in Rule 24(c), Federal Rules of Criminal Procedure, Mr. Schiffer in argument stated:

"Now we have systematically throughout this entire trial to this moment, if it may be called a trial technically begun, we have been systematically excluded, not merely from what I think are basic rights in this case and as the Supreme Court has enumerated them, but I firmly believe now, and I am convinced, and I say this with full integrity as an officer of the court, that in no event can Mr. Parks now succeed in obtaining a fair trial in this court."

(b) On Friday, February 7, 1964, as set forth in Volume 16, pp. 3789 and 3790, after the Court requested Mr. Schiffer to state his objection but reserve argument in the presence of the jury, Mr. Schiffer stated in the presence of the jury:

"My motion is, may Your Honor respectfully allow me to withdraw from the case so I can put this defendant of mine under the protection of the Court

and let Your Honor defend him because I am being prevented from defending him, but this is why, every time I rise for an objection Your Honor takes it out on me in front of the jury and I think Mr. Parks is being deprived of . . .
[The Court interposing:]

"Mr. Schiffer, I believe the record will reflect that you have had more opportunity to speak than any counsel in this record and the Court has just requested that you state your objections and not be making repetitious argument on the same objection."

Mr. Schiffer: "I am not making repetitious argument. The fact that Your Honor has stated that again prejudices Mr. Parks before this jury. I must make these objections and I find that now he doesn't need a lawyer any more in this case, Your Honor, because the way this case is going with this witness, he has been permitted time and again to make statements which are not responsive. He defies the order of the Court but the Court idly does nothing with this witness and this is prejudicing my man. Let me withdraw from the case and I will put my defendant under the agency and protection of the Court and let the Court ask the questions for him."

(c) On Monday, February 10, 1964, as set forth in Volume 17, p. 4148 of the transcript, Mr. Schiffer stated in argument:

"However, it is mighty significant, Your Honor, that just as soon as we start getting close to what are our defenses, as I have related to the Court three weeks ago in open court and so it is on the record, as soon as we start drawing the illegality to the pants of Mr. Neal he just becomes frightened and runs to the aid of an affiliate, the Court, and wants to drape himself in some kind of chastity which he never had to begin with."

(d) On Wedensday, February 19, 1964, as set forth in Volume 24, p. 6290 of the transcript, in the presence of a defense witness then being cross-examined by the prosecution, Mr. Schiffer stated:

> "I just want to caution him, Your Honor, through the Court, I just want to caution this witness not to say that he ever met Mr. Hoffa more than four times. Otherwise he will be indicted as a conspirator by Mr. Neal."

(e) On Tuesday, February 25, 1964, as set forth in Volume 28, p. 7470 of the transcript, Mr. Schiffer stated in argument:

> "It's about time we had a jury trial here, not the kind of trial Mr. Neal wants . . ."

(f) On Thursday, February 27, 1964, as set forth in Volume 30, p. 7835 of the transcript, Mr. Schiffer, in arguing with regard to the Court's action in sustaining an objection to the testimony of a witness relating to matters that were wholly and completely collateral to any issue in the lawsuit, stated:

> "Well, Your Honor, may I say this, if in this United States of America we have sunk to the low point in a United States court where a witness for the prosecution commits treason, with the knowledge of the prosecutor, and we are to be prohibited on the defense from exposing that kind of dirty, vicious deal, justice is finished in America."

IV. Mr. Schiffer deliberately, knowingly, and intentionally sought to use this Court in such manner as to attempt to evade the provisions of 47 U.S.C. 605, relating to the unlawful interception and publication of radio communications, in this instance radio communications of the Federal Bureau of Investigation intercepted by the witness Bernard Spindel, who was employed for the purpose of making the interceptions by Mr. Schiffer. Mr. Schiffer sought to use

the Court to obtain the release and publication of the said interceptions, while believing that any release or publication of the intercepted radio publications by himself would be unlawful. As set forth in the transcript, Volume 18, pp. 4461-4474, and Volume 19, pp. 4615-4619, Mr. Schiffer delivered unto the Court during a noon recess on February 10, 1964 a sealed envelope as an exhibit to a motion filed upon that date, without in any way advising the Court that such exhibit had not been made available to all counsel nor as to the reason for its being sealed, nor as to its contents, whereupon the Court acting in good faith and without suspecting any purpose other than to make available a proper and lawful exhibit to a motion, opened the envelope and filed the contents as a part of the record. Thereafter upon March 5, 1964, Mr. Schiffer sought to again tender to the Court in chambers a sealed exhibit identified as a further production of radio interceptions by the witness Bernard Spindel, but the Court, by reason of its former experience, refused the same and required that it be filed with the clerk and tendered in open court if tendered at all. In connection with the tender of this document it became abundantly clear that Mr. Schiffer was seeking to use the Court to attempt to evade the provisions of 47 U.S.C. 605 and to attempt to use the Court to commit an act of publishing said documents which if performed by himself he believed would be unlawful. The full account of the conduct and actions of Mr. Schiffer in this regard is set forth in the record at Volume 35, pp. 9085-9107.

V. Accordingly, the Court does hereby adjudge Jacques M. Schiffer in wilful and criminal contempt of this Court under Rule 42(a), Federal Rules of Criminal Procedure, 18 U.S.C.

ENTER:

/s/ *Frank W. Wilson*
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,886

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

JACQUES M. SCHIFFER,
Defendant-Appellant.

(Filed Sept. 9, 1965)

BEFORE: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
Carl W. Reuss
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,886

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

JACQUES M. SCHIFFER,
Defendant-Appellant.

(Filed Sept. 29, 1965)

ORDER

BEFORE: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

For the purpose of correcting an error in transcription the Court *sua sponte* ORDERS that the word "effective" appearing in the fifth line of the third paragraph on page 2 of the slip opinion in this case be eliminated and the word "offensive" be substituted in its place.

Entered by order of the Court.

Carl W. Reuss

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,886

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

JACQUES M. SCHIFFER,
Defendant-Appellant.

(Filed Oct. 8, 1965)

ORDER

BEFORE: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

On consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

Entered by order of the Court.

Carl W. Reuss
Clerk

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

JACQUES M. SCHIFFER,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 7, 1965.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 22d
day of October, 1965.

APPENDIX B

Constitutional Provisions, Rule and Statutes Involved.

18 USC § 1

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 USC § 401

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other; as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

47 USC § 501

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other

than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

47 USC § 605

No person receiving or assisting in receiving, or transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, pur-

port, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Rule 35, Federal Rules of Criminal Procedure:

"The Court may correct an illegal sentence at any time. . . ."

Rule 42 (a), Federal Rules of Criminal Procedure:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order or contempt shall recite the facts and shall be signed by the judge and entered of record.

Constitution of the United States:

Article III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Article III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

Article III, § 3

. . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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205-447—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 776

JACQUES M. SCHIFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 351 F. 2d 91.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1965. A petition for rehearing was denied on October 8, 1965. On October 22, 1965, the time to file a petition for a writ of certiorari was extended by Mr. Justice Stewart to December 7, 1965, and the petition was filed on November 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the court to proceed at the conclusion of the trial under Rule 42(a), F.R. Crim. P., in adjudging petitioner, an attorney, guilty of contemptuous conduct during the trial.

2. Whether the court could constitutionally impose a sixty-day sentence after the non-jury contempt proceeding.

3. Whether the court had power to correct an illegal sentence after a notice of appeal had been filed.

4. Whether petitioner's contempt in attempting to have the court divulge certain communications was committed in the presence of the court.

5. Whether petitioner's conduct was contumacious.

STATEMENT

Petitioner was defense counsel for Thomas Ewing Parks, one of the defendants in *United States* v. *Hoffa, et al.*, a jury-tampering trial in the United States District Court for the Eastern District of Tennessee which began on January 20, 1964, and concluded on March 6, 1964. On March 12, 1964, immediately after the convicted defendants in that case had been sentenced, the trial judge read a certificate filed pursuant to Rule 42(a), F.R. Crim. P., in which he found petitioner guilty of criminal contempt (Pet. App. 9–19). After allowing petitioner an opportunity to make a statement, the court imposed a sentence of confinement for 60 days and a fine of $1,000 (R. 3876). After notice of appeal had been filed, the court *sua sponte* struck the fine from the

sentence (R. 3590–3591). The court of appeals affirmed.

The certificate of contempt stated that petitioner's conduct during the trial constituted a deliberate attack on the administration of justice and an attempt to prevent the proper functioning of the court, and that it tended, if uncorrected, to destroy respect for the court. Noting that full appreciation of petitioner's conduct could be had only by actual presence in the courtroom, the court set forth four general areas of contempt with specific citations to pertinent parts of the trial record.

1. The court found that petitioner had repeatedly engaged in abusive and insulting argument to the court, deliberately seeking to provoke the court into taking action that might form a basis of error or cause delay in the trial. The court set forth (Pet. App. 10–13) a number of instances in which petitioner had charged the court with operating a "drum head court martial" and conducting a "star chamber proceeding" and had suggested that the court's conduct "smacked of Stalinism, Hitlerism, Mussoliniism and all kinds of isms * * *." These remarks were made in connection with ordinary rulings such as a limitation on peremptory challenges to alternate jurors and a ruling with respect to a document alleged to be producible under the Jencks Act (Pet. App. 11).

2. Petitioner repeatedly charged the court with aiding the commission of perjury by witnesses and protecting or concealing alleged perjurers. The specific remarks appear at Pet. App. 13–16.

3. Petitioner repeatedly abused and maligned the court to such an extent as to indicate a studied attack on the administration of justice (Pet. App. 16–18). For example, when the court on February 7, 1964, requested petitioner merely to state his objection but to reserve argument until the jury left, petitioner, in the presence of the jury, asked that he be allowed to withdraw from the case because he was being prevented from defending his client and told the court to take over his client's defense (Pet. App. 16–17).[1]

4. The court also found that petitioner deliberately, knowingly, and intentionally sought to use the court to evade the provisions of 47 U.S.C. 605, relating to the unlawful interception and publication of radio communications, by delivering a record of such interceptions in a sealed envelope and having the court file the contents as part of the record (Pet. App. 18–19).

ARGUMENT

1. Petitioner's principal contention is that although his contempt was committed in the court's presence, the district judge had no power in this case to proceed under Rule 42(a), F.R. Crim. P., because the court had failed to warn petitioner during the trial that he would be subject to contempt proceedings for his

[1] In this connection, the judge warned petitioner not to make repetitious arguments on the same objection (R. 3670). When petitioner persisted and said that the court "idly does nothing" and that the court should defend his client (R. 3670–3671), the court said (R. 3671): "Do you have anything further? Just please make a note of this in the record. We will take it up at a later time. The jury will disregard the arguments of counsel.* * *"

conduct (Pet. 7–11). The court of appeals properly rejected this argument on the grounds (1) that petitioner had, on one occasion, been expressly warned that the matter would be taken up "at a later time" (see fn. 1, *supra*) and had often been told specifically "to keep his voice down, to sit down, and to keep within the law" (Pet. App. 6) and (2) that warnings were unnecessary when, "as here, the conduct was clearly contemptuous" (Pet. App. 6).

Early in the case, when petitioner asked for clarification of the judge's instructions that arguments not be made in front of the jury, the judge pointed out that petitioner was an experienced attorney, that there was no limitation upon the examination of witnesses, and that he expected counsel to be aware of what would be proper in the matter of argument (R. 3605). The judge cautioned petitioner against unnecessary argument (R. 3670), told him to keep his voice down (R. 3682) and also stated, on one occasion, when petitioner continued to make legal arguments in the presence of the jury, that he would take the matter up at a later time (R. 3671)—a statement which the court of appeals correctly treated as a warning that contempt proceedings might ensue. Moreover, the record cannot reflect the tone in which the court uttered the "all right" which followed many of petitioner's outbursts (R. 3595, 3685, 3740, 3814, 3817, 3818, 3826). Those remarks may well have suggested disapproval and warning.

This Court sustained, in *Sacher* v. *United States*, 343 U.S. 1, a similar procedure whereby attorneys

were adjudged in contempt for obstructive tactics during the trial. The record in this case supported the court's conclusion that abusive and obstructive conduct had been engaged in by petitioner (pp. 9–11, *infra*). On this record, unlike that in *Sacher*, these were no "incontinent wrangles between court and counsel" (343 U.S. at 38, Frankfurter, J., dissenting), nor could it be said that the judge had shown "such bitter hostility to the lawyers that the accuser should be held disqualified to try them" (343 U.S. at 15, Black, J., dissenting). The record demonstrates, rather, that the judge tolerated petitioner's conduct with equanimity in the course of the trial, warned him specifically on one occasion, and otherwise made entirely clear his disapproval of petitioner's actions. Since the conduct had been committed in his presence, the judge could, at the conclusion of the trial, enter the appropriate certification and order under Rule 42(a), F.R. Crim. P.[2]

2. Petitioner's contention that the imposition of a sixty-day sentence for contempt after a non-jury proceeding was unconstitutional (Pet. 12–15) is patently unsound. This sentence was well within the limit for petty offenses, and could be imposed without the

[2] *Harris* v. *United States*, No. 6, decided December 6, 1965, does not bear on the issue involved here. In *Harris* this Court held that a district judge could not treat as contempt under Rule 42(a) a witness' refusal to testify before a grand jury because the "real contempt" (slip opinion, p. 3) was committed in the grand jury room and not in the presence of the court. The conduct here was committed in the courtroom and constituted "insolent tactics" and an affront to "the dignity of the court."

intervention of a jury even under this Court's *dictum* in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12. Indeed, in *District of Columbia* v. *Clawans*, 300 U.S. 617, 627–628, this Court observed explicitly that while there might be some doubt whether a sentence of more than six months could be imposed without a jury trial, a penalty of ninety days was within the constitutional bounds.

3. The sentence initially imposed—imprisonment for sixty days and a fine of $1,000—was clearly illegal since only imprisonment *or* a fine is authorized by 18 U.S.C. 401. *In re Bradley*, 318 U.S. 50. The court therefore had power, under Rule 35, F.R. Crim. P., to correct it any time. The jurisdiction to act in this manner existed even though a notice of appeal had been filed. See *Corey* v. *United States*, 375 U.S. 169, 175; *Bartone* v. *United States*, 375 U.S. 52.

4. Petitioner also argues that the conduct set forth in Part IV of the specifications does not amount to contempt in the presence of the court (Pet. 17–18). The relevant facts, in context, are as follows: Petitioner and other counsel, throughout the trial, claimed that they were being followed, that their telephones were being tapped and that they were under such surveillance as to interfere with their consultations with clients. In connection with one such motion, petitioner delivered to the court a sealed transcript as an exhibit on a motion for a new trial without sending a copy to the government (R. 3742–3743). After the court indicated that it would grant a hearing on the claim of surveillance at such time as would

not interfere with the trial (R. 3727), counsel stated that they would seek an order from the court of appeals. In connection with a discussion of the record on such appeal, the district court revealed that it had opened and read the exhibit and made it a matter of public record (R. 3735–3737). The exhibit was a transcript of radio interceptions by one Spindel, an electronic-eavesdropping expert hired by petitioner (R. 3735). Petitioner subsequently stated he had not given a copy of the exhibit to the government "because of the subject matter which it contained in view of the state of the law which we did not want anything published" (R. 3743). Subsequently on March 5, 1964, petitioner sought to deliver to the court in chambers a second document, which the court refused to receive unless it was tendered in open court (see R. 3856). At the hearing on alleged surveillance, held after trial, counsel stated that they did not want to be responsible for divulging the contents of the documents and wished to have the court order it to be opened (R. 3844–3847).

Petitioner was primarily responsible for this course of conduct, and the judge could reasonably infer that he was seeking to misuse the court in order to avoid personal involvement in the commission of an offense. The conduct which formed the gist of the contempt was the act of tendering the sealed documents to the court in order to have the judge unwittingly make the disclosure forbidden by law. This act was committed in the court's presence and could have been summarily punished when it was performed.

The court did not lose its power to deal with such conduct merely because the judge patiently deferred any action until the end of the proceedings in order to avoid delay and disruption.

5. Petitioner's final contention is that his conduct was not obstructive (Pet. 19–23). Although, as the district court noted, the full extent of the contempt cannot be reflected in the record without observation of petitioner's conduct in the courtroom (see *Fisher* v. *Pace*, 336 U.S. 155, 161), the intemperate nature of petitioner's remarks does sufficiently appear from the record. A full examination of these incidents rebuts any suggestion that they were caused by the tension of a hotly contested trial. The misconduct was so frequent and repetitive as to reflect deliberate action. Petitioner's charges of "drum head court-martial," the court's protection of perjury, and his abuse of the court began as early as January 22 (R. 3593–3594), and were repeated on January 27 (R. 3599–3602), February 5 (R. 3664–3669), February 7 (R. 3679–3685), February 10 (R. 3713), February 11 (R. 3738–3740), February 13 (R. 3753–3760), February 19 (R. 3775), February 20 (R. 3779–3780), February 25 (R. 3813–3818) and February 27 (R. 3822–3826). They were prompted by ordinary rulings such as the court's statement that a matter had previously been covered by motions (R. 3593–3594); a limitation of the number of challenges to alternate jurors (R. 3601–3602); a ruling on the admissibility of a document (R. 3667–3668); a ruling that a hearing on alleged surveillance would be held at the conclusion rather

than in the midst of trial (R. 3739–3740); and a ruling making certain telephone transcriptions available to the defendants (R. 3813–3814).

Petitioner's conduct on February 7 (R. 3678–3685) would itself justify the sentence here imposed, although, as noted above, it was only one of a long series of outbursts by him. On that day, after petitioner had been requested not to make repetitious argument on the same objection, he accused the court of bias in the jury's presence and asked to withdraw and have the court defend his client (R. 3670–3671). He was warned by the court that "we will take it up at a later time" (R. 3671). After the jury had been excused, petitioner made a motion for a mistrial which was overruled (R. 3678). He then started a long colloquy on the same subject, interspersed with references to "drum head court-martial" (R. 3679–3680). The judge asked petitioner not to be so loud and to stay within the law (R. 3682). Petitioner continued the harangue, again ending with a characterization that the court was giving the government a "drum head court-martial proceeding" (R. 3682–3685). This kind of conduct, constantly repeated, cannot be excused as a momentary lapse or as necessary to support the interests of a client. The conduct here is entirely different in kind and degree from that involved in *In re McConnell,* 370 U.S. 230.

There is no merit to petitioner's argument that his repeated intemperate outbursts did not amount to contempt because they did not in fact obstruct justice. The kind of conduct in which petitioner engaged—

even though often outside the presence of the jury—constituted an obstruction of justice because it delayed the trial and demeaned the court. The fact that the judge remained unmoved by petitioner's conduct reflects more on the judge's patience and equanimity than on petitioner's conduct. Obviously an assault on a judge in a courtroom would be no less a contempt if the judge successfully resisted it and emerged unharmed than if he were seriously injured.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

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No. 776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JACQUES M. SCHIFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Reply Brief for Petitioner

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AUTHORITIES CITED

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IN THE

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JACQUES M. SCHIFFER,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Reply Brief for Petitioner

Question 1. Respondent's argument entirely overlooks and totally fails to answer the pervading issue raised in Point 1 of the Petition: does Rule 42(a) F.R. Crim. P., as read in light of *Sacher* v. *United States*, 343 U.S. 1, permit the imposition of summary punishment, well after the need for immediate control of the proceeding has ended, for acts unnoted at the time they occurred?

The Court of Appeals had answered affirmatively by stating that warnings by the Court were not essential

where "the conduct was clearly contemptuous" (App. 6). Respondent however, has totally failed to meet this issue and may have conceded it, since it has confined its answer to strained efforts to create warnings from the improbable assumption of an angered tone of voice (R. br. 5) and an ambiguous comment, in the presence of the jury, directing that a matter be taken up later. (R. br. 5; R. 3671).

To permit even "clearly contemptuous" acts, whatever they may be, to go unnoted by a judge until any undefined time long after they have occurred in his presence, overlooks the reason for the warning or the taking note of the acts. Its purpose is to perform that instant action necessary to control the proceedings and thereby stop any further contemptuous conduct. It is not to notify the contemnor that his actions are contemptuous. Thus the "speedy punishment [of Rule 42(a) F.R. Crim. P.] . . . necessary in order to achieve 'summary vindication of the courts' dignity and authority' ", *Harris* v. *United States*, ... U.S. ....., 15 L.Ed. 2d 240, 242, is postponed in favor of "speedy" notification, *Sacher* v. *United States*, 343 U.S. 1, 10. The import of both is to immediately vindicate the dignity and authority of the Court and prevent further violations. Thus some warning, or taking note of the act, is necessary, contrary to the holding of the Court of Appeals in lieu of the immediate punishment.

If respondent urges that irrespective of the foregoing, warnings were in fact given in the trial below, this court should inform the bench and bar of some standard by which the bench may act to take note of indecorous acts, and by which the bar may be thus informed. Though petitioner earnestly contends no warnings were here given, certainly a repeated "all right" from the Court at the conclusion of argument, or a caution against unnecessary

argument (R. br. 5) are insufficient to inform a contemnor and thereby control the proceedings. Without some standard laid down by this Court, trial judges will be free to await "the close of the trial to pounce upon [counsel] for some offense unnoted at the time it occurred." *Sacher* v. *United States,* 343 U.S. 1, 10, 11, or noted so ambiguously as to constitute no notification whatsoever.

Question 2. Respondent has replied to petitioners' contention that he was constitutionally entitled to the right of trial by jury by completely ignoring the fact that this court has granted certiorari on this issue in *Cheff* v. *Schnackenberg,* No. 67. Cheff had been held in criminal contempt of the United States Court of Appeals for the Seventh Circuit, 341 F.2d 548, and sentenced to six months imprisonment, the maximum permitted as a petty offense, 18 U.S.C. 1.

Notwithstanding, respondent urges only that since petitioner's sentence of sixty days was well within the maximum limits of a petty offense, even under the *dictum* of *United States* v. *Barnett,* 376 U.S. 681, 695, n.12, petitioner was not constitutionally entitled to a trial by jury (R. br. 6-7). But it matters not whether the sentence be six months, sixty days, or six minutes, for this court has undertaken to decide whether a sentence which is *within* the limits of a petty offense is constitutionally permissible without granting the right to trial by jury.

Petitioner submits the issue involved in *Cheff* is also presented in this case, and, accordingly, certiorari should be granted.

Questions 3, 4 and 5. These questions have been fully and adequately presented by the petition and respondent has failed to raise any issue not fully answered by the petition.

For all of the reasons set forth in the petition and this reply we urge that a writ of certiorari be issued.

Respectfully submitted,

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No. 776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JACQUES M. SCHIFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petition for Rehearing

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Petition for Rehearing

By virtue of the denial of the petition for writ of certiorari in this cause, this Court will effectively permit the several district courts of the United States to impose punishment for criminal contempt, without a hearing, at the conclusion of a case, for acts unnoted at the time they occurred. Together then with this Court's decision in *Cheff* v. *Schnackenberg*, 16 L.Ed. 2d 629, it is thus possible for a district court to sentence a practicing attorney to

imprisonment for as much as 6 months, without a hearing, for actions never called to his attention until the moment of sentencing. This combined result is such to make the practice of law in an attorney's representation before a trial court fraught with hidden dangers.

In the instant case petitioner was totally unaware that any act or statement made or taken by him during a course of a seven week trial was considered by the court to be contemptuous of the court's dignity. Not until the case had been concluded was he advised that his actions which occurred long before were such as to subject him to imprisonment. Even if, as this court stated in *Cheff*, the proceedings imposing a sentence of less than six months are equivalent to "a procedure to prosecute a petty offense" 16 L.ed. 2d 629, 633, nevertheless, even those minimal procedural requirements were obviated here where no hearing was had whatsoever.

The purpose of informing or warning the contemnor is to effectuate the instantaneous action necessary to control the proceedings and thereby stop any further contemptuous conduct. It is, therefore, for that reason that the procedural safeguards of due process are permitted to be eliminated under Rule 42(a), Fed. R. Crim. P., and the immediate imposition of sentence for contempt, without a hearing, has been permitted. This court has concluded that if the trial court "believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his powers."[1] However, where the speedy punishment permitted by Rule 42(a) has been deferred to the conclusion of the case and where such speedy action, eliminating the procedural requirements of due process, is necessary in order to achieve a summary

[1] *Sacher* v. *United States*, 343 U.S. 1, 11 (1952).

vindication of the Court's dignity and authority, postponement of immediate punishment must be done only in favor of a speedy notification. We have found no case comparable to the case at bar: where the due process requirement of a hearing was dispensed with; where punishment was postponed to the end of the trial; and, where the court did nothing at the time of the contempt—by warning or otherwise—to control the proceedings and vindicate its authority.

The import of both the speedy notification and immediate punishment is to immediately vindicate the dignity and authority of the court and prevent further violation. If, however, both speedy punishment and speedy notification are eliminated, there is no justification for denying the contemnor his procedural rights of due process and a hearing on the issues.

The denial of the petition for certiorari together with this court's opinion in *Cheff* creates an extraordinary extension of the elimination of due process. Unless this court lays down some precise standards, trial judges will be free to await "the close of the trial to pounce upon [counsel] for some offense unnoted at the time it occurred", (*Sacher v. United States*, 343 U.S. 1, 10, 11,) or noted so ambiguously as to constitute no notification whatsoever and thereupon impose sentences of up to six months in prison.

Petitioner earnestly requests that this court grant certiorari since the decision of the Court of Appeals has enlarged the scope of the contempt power by permitting the imposition of summary punishment, well after the need for immediate control of the proceedings has ended for acts unnoted at the time they occurred. The decision of the Court of Appeals raises a fundamental question of the extent to which procedural rights guaranteed by the Constitution may be superseded in cases of direct contempt.

CONCLUSION

Petitioner respectfully asks that this Court issue its writ of certiorari to the Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in this cause.

Respectfully submitted,

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